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The Doctrine of Constitutional Immunity — Where Did It Come From and What Does It Do?

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What is "constitutional immunity"?

Recently, the Office of Legal Counsel ("OLC"), that part of the Department of Justice that serves as the President's lawyers in his "official capacity" have made a number of arguments attempting to limit the ability of the House to obtain evidence in its impeachment inquiry.

A few days ago, the OLC asserted that "constitutional immunity" rendered Dr. Charles Kupperman, a former national security adviser, "absolutely immune" from compelled testimony before Congress. Because there's been no detailed discussion of this argument online (not that I could find at least), I have penned this short article.

Background

As part of its ongoing impeachment inquiry, the Permanent Select Committee On Intelligence served a subpoena on Charles Kupperman, the former Deputy National Security Adviser (from January to September 2019) and Acting National Security Adviser for 10 days in September 2019.

The same day that Kupperman received the subpoena (October 25th), he received a letter, over the signature of White House Counsel Pat Cippollone, directing him not to comply with the subpoena. And also on that same day, Kupperman filed suit in the District of Columbia District Court (in the form of an interpleader) naming both the House of Representatives and Donald Trump as defendants. While the posture is somewhat complex, the principles are not: Kupperman is willing to do what he is told but cannot resolve, himself, the tension between the directions of the House and of the President.

The Arguments

That the House, and its committees, have subpoena power, is beyond question. While one of Kupperman's arguments is that the subpoena exceeds the jurisdiction of the Permanent Select Committee on Intelligence, that argument has already been rejected by the DC Circuit and will not be further addressed here.

The argument raised by OLC in directing Kupperman not to comply with the House subpoena is that "that [Kupperman] is absolutely immune from compelled congressional testimony with respect to matters related to his service as a senior adviser to the President." This is "absolute immunity" is premised on the notion of constitutional immunity, which finds its origin in the writings the soon-to-be Chief Justice William Rehnquist during his own time in the OLC in the Nixon Administration.

According to Rehnquist, and as adopted and repeated by different Department of Justice officials over the years, the separate constitutional status of the President makes him (or her) immune from being compelled to testify before other branches of the government, including the House. Further, because the President has such immunity, so too do his (or her) "close personal advisers" who are essentially "alter egos" of the President. Finally, the letter extends the principle to include "former advisers" (such as Kupperman), because, there is no "material distinction" between current and former advisers.

There is a lot to unpack here. First, this argument shares a lot of DNA with arguments about criminal and civil immunity of sitting Presidents that President Trump and the Department of Justice have advanced in opposition to the subpoena by New York County District Attorney Cyrus Vance and elsewhere. Second, while the OLC and the Department of Justice have advanced such positions, the Cippollone letter cites only to the OLC's own opinions in support of its arguments. It's a bit of "I said this before, and I will say it again" type argument, a classic tautological fallacy. Moreover, the fundamental premise, *viz.*, that the Presidency cannot effectively function subject to oversight by other branches of government, seems lacking. After all, the President has many other effective ways of checking legislative overreach, from vetoing bills to impounding funds that otherwise would be spent to fulfill legislative programs. History also weighs in against it, as the Presidency has substantially increased in power vis-à-vis the legislative branches over the past century.

Courts, perhaps unsurprisingly, have been less enthused about "constitutional immunity" as a defense than the OLC. The one court to have squarely addressed the issue, the same District of Columbia District Court addressing Kupperman's case, squarely denied its application, at least on the facts before it. In *Committee on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008), the House Committee on the Judiciary had brought suit against Counsel to the President Harriet Miers and White House Chief of Staff Joshua Bolten to enforce its subpoenas for testimony and documents relating to the termination of nine United States Attorneys during the Bush Administration. Relying on the Supreme Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), that senior presidential advisors do not enjoy absolute immunity from civil suits based on official acts (even though the President does), the District Court ruled that neither Miers nor Bolten could invoke "constitutional immunity" to avoid compliance with the House subpoenas. However, that case settled shortly after the District Court ruled and the issue accordingly did not reach the D.C. Circuit or the Supreme Court. The *Miers* case currently stands alone, but it remains the only precedent on this issue (putting aside OLC's own memos) and it stands squarely in opposition to the views expressed in the Cipollone letter.

In sum, "constitutional immunity" is an often advanced but rarely tested argument. Moreover, it is one that, contrary to its name, finds support neither in the text nor the structure of the Constitution, at least as to actors other than the President.